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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-94278; File No. SR-BOX-2021-14]**

**Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, in Connection with the Proposed Establishment of BSTX LLC as a Facility of the Exchange**

February 17, 2022

**I. Introduction**

On June 7, 2021, BOX Exchange LLC (“Exchange” or “BOX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change in connection with the proposed commencement of operations of BSTX LLC (“BSTX”) as a facility of the Exchange. The proposed rule change was published for comment in the *Federal Register* on June 24, 2021.<sup>3</sup> On August 3, 2021, pursuant to Section 19(b)(2) of the Exchange Act,<sup>4</sup> the Commission designated a longer period within which to

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 92206 (June 17, 2021), 86 FR 33402 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-box-2021-14/srbox202114.htm>. The Commission received one comment letter that expresses opposition to the proposal but without specificity as to why. See Letter from David (September 23, 2021).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On September 16, 2021, the Exchange filed Amendment No. 1 to the proposed rule change (“Amendment No. 1”), which replaced and superseded the proposed rule change as originally filed.<sup>6</sup> On September 21, 2021, the Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act<sup>7</sup> to determine whether to

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<sup>5</sup> See Securities Exchange Act Release No. 92556, 86 FR 43572 (August 9, 2021). The Commission designated September 22, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

<sup>6</sup> In Amendment No. 1, the Exchange revised the proposal to: (1) Adopt the BSTX LLC Third Amended and Restated Limited Liability Company Agreement prior to the commencement of operations of BSTX as a facility of the Exchange, which, among other things, (a) changes the legal name of the facility from “Boston Security Token Exchange LLC” to “BSTX LLC,” (b) modifies certain defined terms, including “BSTX Product” and “Competing Business,” (c) defines the term “Governmental Authority” and modifies certain provisions to permit access to certain confidential information by any such authority, and (d) adds a provision that would, among other things, require an effective rule filing pursuant to Section 19 of the Exchange Act prior to any Member, or Related Person of such Member, becoming a BSTX Participant if such Member, alone or together with any Related Persons of such Member, has the right to appoint more than 20% of the BSTX Directors entitled to vote; (2) provide additional information about ownership of non-voting Class B Units; (3) clarify how limitations on voting of interests in BOX Holdings are implemented by reallocating voting rights to other BOX Holdings owners, and how a similar provision in the BSTX LLC Agreement would operate; (4) discuss certain provisions and associated definitions in the BSTX LLC Agreement that are the same or different from those that currently apply to BOX Holdings and BOX Options, particularly with respect to the board structure, intellectual property, and automatic admission of Class B Units as Members; (5) provide additional description of limitations on voting and ownership of interests in the Exchange; (6) provide additional description of the roles, obligations, and authorities of BOX Digital, tZERO, and the Exchange with respect to BSTX; (7) describe the funding of operations of BSTX; (8) clarify representation of BSTX Participants on the Exchange’s Board and committees, and how those representatives would be appointed at the commencement of operations; and (9) make other technical, clarifying and conforming changes.

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

approve or disapprove the proposed rule change, as modified by Amendment No. 1.<sup>8</sup> On December 15, 2021, pursuant to Section 19(b)(2) of the Exchange Act,<sup>9</sup> the Commission designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.<sup>10</sup> On January 18, 2022, the Exchange filed Amendment No. 2, which

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<sup>8</sup> See Securities Exchange Act Release No. 93094, 86 FR 53365 (September 27, 2021) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings) (“OIP”).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> See Securities Exchange Act Release No. 93786, 86 FR 72296 (December 21, 2021).

replaced and superseded the proposed rule change, as modified by Amendment No. 1.<sup>11</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2 (“BSTX Governance Proposal”), from interested persons and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

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<sup>11</sup> In Amendment No. 2, the Exchange revised the proposal to: (1) Revise the BSTX LLC Agreement by, among other things, (a) introducing certain defined terms, including “Shortfall Amount,” “Statutory Disqualification,” and “Tax Matters Representative,” (b) converting existing class A and class B units of BSTX to economic units and voting units of BSTX, (c) prohibiting events that would result in any person, together with its related persons, holding an economic interest in BSTX greater than 40% or a voting interest in BSTX greater than 20% without both Exchange approval and an effective rule filing pursuant to Section 19 of the Exchange Act, (d) prohibiting BSTX Participants from holding either an economic interest or voting interest in BSTX greater than 20%, (e) modifying the structure and composition of the BSTX board of directors by limiting BOX Digital and tZERO to one director each, providing the regulatory director with voting rights, adding the BSTX CEO as a director, and providing that the independent director will serve as chairman of the board of directors, (f) providing that no person subject to a statutory disqualification will serve as a BSTX director or officer, and (g) removing the requirement that the BSTX board of directors will create and appoint audit and compensation committees; (2) specify the individuals and entities that own economic and voting interests in BSTX and at what levels, including that BOX Digital and tZERO’s economic interests have been reduced to 40% each and that BOX Digital and tZERO’s voting interests have been reduced to 20% each; (3) state that the Exchange will not distribute regulatory funds to its owners and that regulatory funds will not be used for non-regulatory purposes; (4) represent that the Exchange will have adequate funding for the Exchange’s operations with respect to BSTX; (5) revise Exhibit 5B to propose the form of Instrument of Accession that each identified Controlling Person would sign; and (6) make other technical, clarifying and conforming changes. Amendment No. 2 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-box-2021-14/srbox202114-20112131-265232.pdf> (“Amendment No. 2”).

## II. Overview

As set forth in the OIP and Amendment No. 2,<sup>12</sup> the Exchange proposes to establish BSTX as a facility of the Exchange (as defined in Section 3(a)(2) of the Exchange Act).<sup>13</sup> The Exchange proposes that BSTX would operate a market for the trading of securities (“BSTX Market”), and with this proposed rule change, the Exchange proposes to adopt the BSTX LLC Third Amended and Restated Limited Liability Company Agreement (“BSTX LLC Agreement” or “LLC Agreement”)<sup>14</sup> as the source of governance and operating authority for BSTX.<sup>15</sup> In a separate action, the Commission approved the Exchange’s proposed rule change to establish the trading rules for BSTX.<sup>16</sup>

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<sup>12</sup> See OIP, supra note 8; Amendment No. 2, supra note 11.

<sup>13</sup> See OIP, supra note 8, 86 FR at 53366. Pursuant to Section 3(a)(2) of the Exchange Act, 15 U.S.C. 78c(a)(2), the term “facility” when used with respect to an exchange, includes “its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

<sup>14</sup> The proposed LLC Agreement is Exhibit 5A to Amendment No. 2. See Amendment No. 2, supra note 11. Capitalized terms not otherwise defined herein have the meanings specified in the BSTX LLC Agreement.

<sup>15</sup> See id. at 3, 5.

<sup>16</sup> See Securities Exchange Act Release No. 94092 (January 27, 2022), 87 FR 5881 (February 2, 2022) (SR-BOX-2021-06) (approving the trading of equity securities on the Exchange through a facility of the Exchange known as BSTX). Among other things, the BSTX trading rules proposal established rules regarding the listing and trading of securities on BSTX and the operations of and eligibility to participate on the BSTX Market.

Ownership interests in BSTX would be represented by two classes of Units: Economic Units<sup>17</sup> and Voting Units.<sup>18</sup> Duly admitted holders of these limited liability company interests would be “Members” of BSTX.<sup>19</sup> Economic Units would represent equity interests in BSTX and entitle holders to participate in BSTX’s allocations and distributions, but would not include the right to vote.<sup>20</sup> Voting Units would represent voting interests in BSTX and entitle holders to participate in votes of BSTX’s Members.<sup>21</sup> Each Member would be a holder of both Voting Units and Economic Units.<sup>22</sup> The total number of Voting Units would be equal to the total number of Economic Units;<sup>23</sup> Voting Units may not be transferred separately from their related Economic Units.<sup>24</sup> Unless required to be adjusted, as discussed

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<sup>17</sup> See BSTX LLC Agreement, Sections 1.1 and 2.5(a); Amendment No. 2, supra note 11, at 7.

<sup>18</sup> See BSTX LLC Agreement, Sections 1.1 and 2.5(b); Amendment No. 2, supra note 11, at 7. The Exchange proposes that all Economic Units would be identical to each other and accord the holders thereof the same obligations, rights, and privileges as accorded to each other holder thereof. Similarly, all Voting Units would be identical to each other and accord the holder thereof the same obligations, rights, and privileges as accorded to each other holder thereof. See BSTX LLC Agreement, Sections 2.5(a), (b); Amendment No. 2, supra note 11, at 7.

<sup>19</sup> See BSTX LLC Agreement, Section 1.1; Amendment No. 2, supra note 11, at 7. Members of the Exchange that are eligible for trading on the BSTX Market would be “BSTX Participants.” See BSTX LLC Agreement, Section 1.1 (defining BSTX Participant as a firm or organization that is registered with the Exchange pursuant to Exchange Rules for purposes of participating in Trading on the BSTX Market as an order flow provider or market maker).

<sup>20</sup> See Amendment No. 2, supra note 11, at 7-8.

<sup>21</sup> See id. at 8; see also id. at 7, n.14.

<sup>22</sup> See BSTX LLC Agreement, Section 2.5(c); Amendment No. 2, supra note 11, at 8.

<sup>23</sup> See BSTX LLC Agreement, Section 2.5(b).

<sup>24</sup> See id. Section 7.1(a); Amendment No. 2, supra note 11, at 47-48.

further below,<sup>25</sup> each Member would hold the number of Voting Units equal to the number of Economic Units it holds.<sup>26</sup> A Member's level of ownership interest would be expressed in terms of its Economic Percentage Interest and Voting Percentage Interest.<sup>27</sup>

Upon adoption of the LLC Agreement, BOX Digital Markets LLC ("BOX Digital"), a Delaware limited liability company and a subsidiary of BOX Holdings Group LLC ("BOX Holdings"),<sup>28</sup> and tZERO Group, Inc. ("tZERO"), a Delaware corporation and an affiliate of

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<sup>25</sup> See infra note 102 and accompanying text.

<sup>26</sup> See BSTX LLC Agreement, Section 7.4(g)(i); Amendment No. 2, supra note 11, at 19-20.

<sup>27</sup> "Economic Percentage Interest" would mean, with respect to a Member, the ratio of the number of Economic Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Economic Units held by Members, expressed as a percentage. See BSTX LLC Agreement, Section 1.1. "Voting Percentage Interest" would mean, with respect to a Member, the ratio of the number of Voting Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Voting Units held by Members, expressed as a percentage. Voting Units held by a Member that are ineligible to vote would not be counted in the numerator or the denominator when determining such ratio. See id.

<sup>28</sup> The Exchange states that BOX Digital is a subsidiary of BOX Holdings and an affiliate of the Exchange, and that BSTX would be an affiliate of the Exchange. BOX Holdings owns 98% of BOX Digital and 2% of BOX Digital is held by Lisa Fall. BOX Holdings already owns one subsidiary that is an existing facility of the Exchange – BOX Options Market LLC ("BOX Options") – which operates a market for trading option contracts on U.S. equities. BOX Holdings is the parent company for both BOX Digital and BOX Options and currently has seven separate, unaffiliated owners. See Amendment No. 2, supra note 11, at 9. The seven separate, unaffiliated owners include: MX US 2, Inc. ("MX US 2"), a wholly owned, indirect subsidiary of TMX Group Limited ("TMX"), which holds 47.89% of the outstanding units of BOX Holdings, IB Exchange Corp. ("IB"), which holds 25.5% of the outstanding units in BOX Holdings, and Citadel Securities Principal Investment LLC, which holds 15.5% of the outstanding units in BOX Holdings. The additional four owners each hold less than five percent of the outstanding units of BOX Holdings. See id. at 9. The Exchange states that Lisa Fall is a Director of BOX Digital. See id. at 8 n.18.

Overstock.com, Inc. (“Overstock”),<sup>29</sup> would each own a 40% Economic Percentage Interest and a 20% Voting Percentage Interest in BSTX.<sup>30</sup> The Exchange proposes that pursuant to the LLC Agreement, tZERO would provide BSTX the intellectual property license and services necessary to operate the BSTX trading system.<sup>31</sup> The Exchange also proposes that

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<sup>29</sup> The Exchange states that ownership of tZERO is held by Medici Ventures, L.P. (“Medici”), a Delaware limited partnership, which owns 44% of the outstanding shares of tZERO, and Overstock, a publicly held corporation organized under the laws of Delaware, which owns 43% of the outstanding shares of tZERO. An individual, Joseph Cammarata, holds 7.53% of the outstanding shares of tZERO, and the remaining shares are held in less than three percent by thirty-one individuals and entities. Pelion MV GP, L.L.C. (“Medici GP”), a Delaware limited liability company, serves as the general partner of Medici and has the sole right to manage its affairs. Medici GP owns one percent of the partnership interest in Medici and Overstock owns 99% of the partnership interests in Medici. Membership interests in Medici GP are held by fifteen individuals and entities, all of who hold less than a 25% interest. The Exchange states that both tZERO and BSTX are affiliates of Overstock, Medici, and Medici GP. See OIP, supra note 8, 86 FR at 53367-68.

<sup>30</sup> See Amendment No. 2, supra note 11, at 8. The Exchange states that FBP Digital LLC, which is wholly owned by Lisa Fall, would own an 11.1% Economic Percentage Interest in BSTX, and each of the following would own less than 5% Economic Percentage Interest: Susan Chamberlin (1.9%), Saum Noursalehi (0.4%), Will Easley (0.4%), Alan Konevsky (0.7%), Jay Fraser (1.4%), Enid Acquisition LLC (1.9%), Chris Zaremba (1.4%), and Todd Treworgy (0.4%). The Exchange also states that FBP Digital LLC will own a 19.6% Voting Percentage Interest in BSTX, and each of the following will own less than a 10% Voting Percentage Interest: Susan Chamberlin (8.8%), Saum Noursalehi (2.1%), Will Easley (2.1%), Alan Konevsky (3.1%), Jay Fraser (6.6%), Enid Acquisition LLC (wholly owned by Glen Openshaw) (8.8%), Chris Zaremba (6.6%), and Todd Treworgy (2.2%). See id. at 8-9. The Exchange states that Alan Konevsky is the CEO of tZERO. See id. at 8 n.21. The Exchange also states that the eleven Members are parties to the LLC Agreement. See id. at 7-8 n.15.

<sup>31</sup> See BSTX LLC Agreement, Section 3.2(b); OIP, supra note 8, 86 FR at 53375. The Exchange states that among other things, under an IP License and Services Agreement by and between tZERO and BSTX (“LSA”), tZERO will provide BSTX and the Exchange with a license to use tZERO’s intellectual property comprising the BSTX trading system, and will provide services to BSTX related to implementing, administering, maintaining, supporting, hosting, developing, testing and securing the trading system. See OIP, supra note 8, 86 FR at 53369, 53375.



pursuant to the LLC Agreement, the Exchange will regulate BSTX as a facility of the Exchange for the listing and trading of BSTX Products, but will not regulate any other market trading BSTX Products.<sup>32</sup>

As is the case with the Exchange’s current facility for trading options, BOX Options, the Exchange would not hold an ownership interest in BSTX,<sup>33</sup> but would regulate BSTX as a facility of the Exchange pursuant to an agreement between the Exchange and BSTX (“Facility Agreement”).<sup>34</sup> As a self-regulatory organization (“SRO”), the Exchange has regulatory responsibility for all of its facilities, including BSTX, and must be so organized and have the capacity to carry out the purposes of the Exchange Act.<sup>35</sup> Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with federal securities laws and rules thereunder and the rules of the Exchange.<sup>36</sup>

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<sup>32</sup> See BSTX LLC Agreement, Section 3.2(c); Amendment No. 2, supra note 11, at 37. “BSTX Product” would mean a Security, as defined in the Exchange Rules, trading on the BSTX System. See BSTX LLC Agreement, Section 1.1. “BSTX System” would mean the technology, know-how, software, equipment, communication lines or services, services and other deliverables or materials of any kind as may be necessary or desirable for the operation of the BSTX Market. See id. Section 1.1.

<sup>33</sup> See OIP, supra note 8, 86 FR at 53366 (describing BOX Holdings ownership of BOX Options, as well as the ownership of BOX Holdings).

<sup>34</sup> See id. at 53366. The Exchange states that it currently operates BOX Options as its only facility, and that it filed a separate proposed rule change to accommodate regulation of BSTX in addition to BOX Options (“Multiple Facilities Filing”). See id. The Commission approved this proposal, which included amendments to the Exchange’s governing documents designed to provide the Exchange the flexibility to regulate additional facilities. See Securities Exchange Act Release Nos. 88236 (February 19, 2020), 85 FR 10765 (February 25, 2020) (Notice of Filing of Proposed Rule Change); 88934 (May 22, 2020), 85 FR 32085 (May 28, 2020) (Order Granting Approval of a Proposed Rule Change) (“BOX-2020-04 Approval”).

<sup>35</sup> See 15 U.S.C. 78f(b)(1).

<sup>36</sup> See id.; see also Section 19(g) of the Exchange Act, 15 U.S.C. 78s(g).

Pursuant to the LLC Agreement, the Members would agree that the Exchange would provide regulatory oversight of BSTX,<sup>37</sup> and the Exchange states that its powers and authority under the Facility Agreement would ensure that the Exchange would have full regulatory control over BSTX.<sup>38</sup> The LLC Agreement would also specifically require the Exchange to receive notice of and approve, among other things, changes to the BSTX System, and would give the Exchange the authority to direct BSTX to eliminate or prevent Regulatory Deficiencies and allow the Exchange to perform and fulfill its regulatory responsibilities under the Exchange Act.<sup>39</sup> The Exchange will also provide certain business services to BSTX such as providing

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<sup>37</sup> The Exchange proposes that the LLC Agreement would provide that the Exchange will act as the SEC-approved SRO for the BSTX Market, have regulatory responsibility for the activities of the BSTX Market, and provide regulatory services to the BSTX pursuant to the Facility Agreement. See BSTX LLC Agreement, Section 3.2(a); OIP, supra note 8, 86 FR at 53370; see also infra Sections III.A and III.B (describing provisions in the LLC Agreement providing for and clarifying the regulatory authority and jurisdiction of the Exchange over the BSTX facility and its Members, Officers, Directors, employees, agents, and Controlling Persons (see infra note 57)).

<sup>38</sup> See OIP, supra note 8, 86 FR at 53366. For example, the Exchange would receive notice of all planned or proposed changes to BSTX (other than with respect to Non-Market Matters). The Exchange states that this authority would ensure that while BSTX operates as a facility of the Exchange, BSTX would be required to submit any such changes to the Exchange for approval and the Exchange would have the right to direct BSTX to make any modifications deemed necessary or appropriate by the Exchange to resolve any Regulatory Deficiency. The Exchange states that this regulatory authority would override any authority of BSTX management, its Members or its Board regardless of any Member's level of ownership or control of the Board at the facility level. See OIP, supra note 8, 86 FR at 53381; Amendment No. 2, supra note 11, at 68.

<sup>39</sup> See BSTX LLC Agreement, Section 3.2(a); OIP, supra note 8, 86 FR at 53372-73. "Regulatory Deficiency" would be defined as "the operation of the Company (in connection with matters that are not Non-Market Matters) or the BSTX Market (including, but not limited to, the BSTX System) in a manner that is not consistent with the Exchange Rules and/or the SEC Rules governing the BSTX Market or BSTX Participants, or that otherwise impedes the Exchange's ability to regulate the BSTX Market or BSTX Participants or to fulfill its obligations under the Exchange Act as an SRO." See BSTX LLC Agreement, Section 1.1. The

human resources and office technology support pursuant to an administrative services agreement between the Exchange and BSTX.<sup>40</sup>

The Exchange proposes that, subject to the regulatory oversight by the Exchange, the board of directors of BSTX (“BSTX Board”) would manage the business and affairs of BSTX without the need for approval of the Members.<sup>41</sup> The Board would consist of five directors (each a “Director”): one Director appointed by BOX Digital, so long as BOX Digital holds an Economic Percentage Interest equal to or greater than 35%, and one Director appointed by tZERO, so long as tZERO holds an Economic Percentage Interest equal to or

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Exchange states that the proposed provisions in Section 3.2(a) of the LLC Agreement are substantially the same as those in the Amended and Restated Limited Liability Company Agreement of BOX Options Market LLC, dated as of August 15, 2018, and help guarantee the Exchange’s ability to fulfill its regulatory responsibilities and operate in a manner consistent with the Exchange Act, and in particular with Section 6(b)(1) of the Exchange Act. See OIP, supra note 8, 86 FR at 53373; see also id. at 53377 n.87 and accompanying text.

<sup>40</sup> See OIP, supra note 8, 86 FR at 53366.

<sup>41</sup> See BSTX LLC Agreement, Section 4.1(a); OIP, supra note 8, 86 FR at 53370, 53881. The Exchange proposes that only to the extent expressly provided for in the LLC Agreement and the Related Agreements, and as delegated by the Board to committees of the Board or to duly appointed Officers or agents of BSTX, neither a Member nor any other Person other than the Board of Directors shall be an agent of BSTX or have any right, power or authority to transact any business in the name of BSTX or to act for or on behalf of or to bind BSTX. See BSTX LLC Agreement, Section 4.9; OIP, supra note 8, 86 FR at 53370; Amendment No. 2, supra note 11, at 23-24. Members would have the right to vote on the admission of additional or substitute Members, the admission of a personal representative or successor in interest of a Member, and the dissolution and winding up of the BSTX. See BSTX LLC Agreement, Sections 7.1(b), 7.5, and 10.1(a)(iii); Amendment No. 2, supra note 11, at 7 n.14.

greater than 35% (each a “Member Director”),<sup>42</sup> the CEO of BSTX, a “Regulatory Director,”<sup>43</sup> and an “Independent Director.”<sup>44</sup> Generally, each of the Directors would be entitled to vote on any action to be taken by the Board.<sup>45</sup>

To help ensure that the Exchange has and will continue to have adequate funding to be able to meet its responsibilities under the Exchange Act, the Exchange represents that it would have adequate funding for the Exchange’s operations with respect to BSTX, including the regulation of the Exchange.<sup>46</sup> The Exchange also states that the Facility Agreement would require BSTX to provide adequate funding to the Exchange’s operations with respect to BSTX, including regulation of BSTX by the Exchange, and that prior to commencing operations as a facility of the Exchange, BSTX will have the necessary funds and assets, including furnishings, equipment, and servers, to adequately operate the BSTX facility until it begins receiving revenues from operations to operate BSTX as a facility of the Exchange.<sup>47</sup> Further, BSTX would not be entitled to any revenue generated from fines, fees, or penalties imposed on BSTX Participants with respect to trading on BSTX (“Regulatory Funds”). Any

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<sup>42</sup> The Exchange states that the one Member Director appointed by each of BOX Digital and tZERO would comprise a maximum of 20% of all Directors on BSTX’s Board. See Amendment No. 2, supra note 11, at 70. A Member Director would not have more than 20% of the total voting power on any committee of the BSTX Board. See BSTX LLC Agreement, Section 4.2(c); Amendment No. 2, supra note 11, at 25 n.52.

<sup>43</sup> The Exchange proposes that for so long as BSTX is a facility of the Exchange, the Exchange will have the right to appoint a member of the senior management of the regulation staff of the Exchange to serve as Regulatory Director. See BSTX LLC Agreement, Section 4.1(a); OIP, supra note 8, 86 FR at 53370.

<sup>44</sup> The Exchange proposes that the Independent Director would be appointed by the affirmative vote of a majority of the other Directors. See BSTX LLC Agreement, Section 4.1(a); Amendment No. 2, supra note 11, at 25.

<sup>45</sup> See BSTX LLC Agreement, Section 4.3; Amendment No. 2, supra note 11, at 27.

<sup>46</sup> See Amendment No. 2, supra note 11, at 37.

<sup>47</sup> See id. at 37-38.

Regulatory Funds received by the Exchange will not be used for non-regulatory purposes, distributed to the Exchange's owners, or remitted to BSTX.<sup>48</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>49</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Exchange Act,<sup>50</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act and to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules or regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(3) of the Exchange Act,<sup>51</sup> which, among other things, requires that the rules of an exchange ensure fair representation of its members in the selection of its directors and

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<sup>48</sup> See id. at 38. Pursuant to the Facility Agreement, the Exchange would be entitled to receive all fees, fines and penalties imposed upon BSTX Participants with respect to the BSTX trading system, as well as market data fees, tape and other revenue including regulatory fees and trading fees, payable by BSTX Participants, as well as any funds received from any applicable market data fees, tape revenue, and other revenue. All such funds may be used by the Exchange for regulatory purposes, as determined solely by the Exchange, and any excess funds will be remitted to BSTX. See id. Further, any "Regulatory Funds" received by the Exchange will not be distributed to the Exchange's owners or used for non-regulatory purpose. See id. at 39 n.77 and accompanying text; see also BOX Exchange LLC Second Amended and Restated Limited Liability Company Agreement, dated November 30, 2020 ("Exchange LLC Agreement"), Sections 1.1, 8.1.

<sup>49</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>50</sup> 15 U.S.C. 78f(b)(1).

<sup>51</sup> 15 U.S.C. 78f(b)(3).

administration of its affairs. In addition, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Exchange Act,<sup>52</sup> which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

A. BSTX as a Facility of the Exchange

The proposed rule change is consistent with Section 6(b)(1) of the Exchange Act in that, upon establishing BSTX as a facility, the Exchange would remain so organized and have the capacity to carry out the purposes of the Exchange Act. As an SRO, the Exchange would have regulatory control over BSTX and would be responsible for ensuring BSTX's compliance with the federal securities laws and all applicable rules and regulations thereunder. Furthermore, BSTX would be obligated under the LLC Agreement to operate in a manner consistent with the regulatory and oversight responsibilities of the Exchange and

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<sup>52</sup> 15 U.S.C. 78f(b)(5).

the Exchange Act and the rules and regulations thereunder.<sup>53</sup> The Commission has previously approved similar structures with respect to the operation of exchange facilities.<sup>54</sup>

Although BSTX would not carry out any regulatory functions, all of its activities must be consistent with the Exchange Act. As a facility of a national securities exchange, BSTX would not be solely a commercial enterprise, but an integral part of an SRO that is registered pursuant to the Exchange Act and therefore subject to obligations imposed by the Exchange Act. The proposed LLC Agreement is reasonably designed to enable BSTX to operate in a manner consistent with this principle. The LLC Agreement would provide that BSTX and its Members, Officers, Directors, agents, and employees shall comply with the federal securities laws and the rules and regulations promulgated thereunder and cooperate with the Exchange and the Commission.<sup>55</sup> Further, BSTX's Members, Officers, Directors, agents, and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and shall not take actions which would interfere with the Exchange's regulatory functions or the Exchange's ability to carry out its

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<sup>53</sup> See BSTX LLC Agreement, Section 4.11(b).

<sup>54</sup> See, e.g., Securities Exchange Act Release Nos. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (order approving New York Block Exchange as a facility of the New York Stock Exchange); 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving CBOE Stock Exchange as a facility of the Chicago Board Options Exchange) ("CBSX Order"); 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (order approving the ISE Stock Exchange as a facility of the International Securities Exchange) ("ISE Stock Order"); 54364 (August 25, 2006), 71 FR 52185 (September 1, 2006) (order approving the Boston Equities Exchange as a facility of the Boston Stock Exchange); and 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (order approving the Boston Options Exchange Regulation as a facility of the Boston Stock Exchange).

<sup>55</sup> See BSTX LLC Agreement, Section 4.11(b).

responsibilities under the Exchange Act.<sup>56</sup> In addition, each Controlling Person<sup>57</sup> would be required to become a party to and abide by all the provisions of the LLC Agreement,<sup>58</sup> and thereby, like Members, commit to comply with the federal securities laws and the rules and regulations promulgated thereunder and to cooperate with the Exchange and the Commission,<sup>59</sup> to give due regard to the preservation of the independence of the self-regulatory function of the Exchange,<sup>60</sup> and to not take actions which would interfere with the regulatory functions of the Exchange or the Exchange's ability to carry out its responsibilities

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<sup>56</sup> See id. Section 4.11(a).

<sup>57</sup> “Controlling Person” would mean a Person who, alone or together with any Related Persons of such Person, holds a Controlling Interest in a Member. “Controlling Interest” would mean direct or indirect ownership of 25% or more of the total voting power of all equity securities of a Member (other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities), by any Person, alone or together with any Related Persons of such Person. See id. Section 7.4(h)(iv). The Exchange represents that the definitions of “Controlling Person” and “Controlling Interest” are the same as those that currently apply to BOX Holdings. See OIP, supra note 8, 86 FR at 53368.

<sup>58</sup> See BSTX LLC Agreement, Section 7.4(h)(i); OIP, supra note 8, 86 FR at 53368; Amendment No. 2, supra note 11, at 12-13. The Exchange states that BOX Digital's upstream owners (BOX Holdings, MX US 2, MX US 1, Inc. (“MX US 1”), Bourse de Montreal Inc. (“Bourse de Montreal”), and TMX) and tZERO's upstream owners (Medici, Medici GP, and Overstock) would be Controlling Persons and, prior to the commencement of operations of BSTX, would be required to become parties to the LLC Agreement and abide by its provisions to the same extent as Members. See OIP, supra note 8, 86 FR at 53368; Amendment No. 2, supra note 11, at 13-14. The Exchange also states that any future Controlling Person would also be subject to its requirements. See OIP, supra note 8, 86 FR at 53376-77; Amendment No. 2, supra note 11, at 51; see also infra note 112 and accompanying text (enumerating the current persons who would be Controlling Persons of BSTX at the commencement of operations).

<sup>59</sup> See BSTX LLC Agreement, Section 4.11(b).

<sup>60</sup> See id. Section 4.11(a).



under the Exchange Act.<sup>61</sup> According to the Exchange, these provisions are designed to help maintain the independence of the Exchange's regulatory function.<sup>62</sup>

The proposed LLC Agreement would provide that all Confidential Information of BSTX or the Exchange pertaining to regulatory matters (including but not limited to disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of BSTX shall not be made available to any persons other than to those Officers, Directors, employees, and agents of BSTX that have a reasonable need to know the contents thereof; would be retained in confidence by BSTX and its Officers, Directors, employees, and agents; and would not be used for any non-regulatory purpose.<sup>63</sup> Nothing in the LLC Agreement, however, would limit or impede the rights of the Commission or the Exchange to access and examine Confidential Information of BSTX pursuant to the federal

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<sup>61</sup> See id.

<sup>62</sup> See Amendment No. 2, supra note 11, at 72-73.

<sup>63</sup> See BSTX LLC Agreement, Section 15.6. The Exchange states that, in order to protect the confidential information of the Exchange, tZERO directors, officers, and employees will only receive confidential information of BSTX and the Exchange, including confidential information pertaining to regulatory matters of BSTX and the Exchange (including but not limited to disciplinary matters, trading data, trading practices and audit information), on a need-to-know basis as it relates to the technology services being provided or specific roles with respect to BSTX and the Exchange, and that they will be subject to confidentiality obligations with respect to any confidential information they receive in the course of performing their services, including regulatory information. The Exchange also states that tZERO employees providing technology services to BSTX or the Exchange will have offices physically separate from employees of BSTX and the Exchange. See Amendment No. 2, supra note 11, at 45-46.

securities laws or limit or impede the ability of Directors, Officers, employees, or agents of BSTX to disclose confidential information to the Commission or the Exchange.<sup>64</sup>

The LLC Agreement would also provide that the Exchange will receive notice of planned or proposed changes to BSTX (excluding Non-Market Matters<sup>65</sup>) or the BSTX Market (including, but not limited to, the BSTX System) which would require an affirmative approval by the Exchange prior to implementation.<sup>66</sup> Also, the Exchange proposes that if the Exchange determines that the planned or proposed changes could cause BSTX or the BSTX Market to operate in a manner that is not consistent with the Exchange Act or the Exchange's rules or would otherwise impede the Exchange's ability to regulate the BSTX Market or BSTX Participants or to fulfill its obligations under the Exchange Act as an SRO (each a "Regulatory Deficiency"), the Exchange may direct BSTX to modify the proposal as necessary to ensure that it does not cause a Regulatory Deficiency.<sup>67</sup> Likewise, if the Exchange determines that a Regulatory Deficiency exists or is planned, the Exchange could direct BSTX to undertake such modifications to BSTX or the BSTX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow the Exchange to perform and fulfill its regulatory responsibilities.<sup>68</sup> Furthermore, the Exchange would review

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<sup>64</sup> See BSTX LLC Agreement, Section 15.6; see also OIP, supra note 8, 86 FR at 53372; Amendment No. 2, supra note 11, at 57-58.

<sup>65</sup> Non-Market Matters would be defined as changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of the Members, communication with the Members, finance, location and timing of Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the BSTX Market, and de minimis items. See BSTX LLC Agreement, Section 3.2(a)(ii).

<sup>66</sup> See id.; see also Amendment No. 2, supra note 11, at 34-35.

<sup>67</sup> See BSTX LLC Agreement, Section 3.2(a)(iii). See also Amendment No. 2, supra note 11, at 35.

<sup>68</sup> See BSTX LLC Agreement, Section 3.2(a)(iv).

any amendment, modification, waiver or supplement to the LLC Agreement and if such amendment is required to be filed with, or filed with and approved by, the Commission before it may be effective, then such amendment would not be effective until filed with, or filed with and approved by, the Commission.<sup>69</sup>

Certain additional provisions in the LLC Agreement that make accommodation for the Exchange as the SRO for BSTX are consistent with the Exchange Act because they enhance the ability of the Exchange to carry out its self-regulatory responsibilities with respect to BSTX. The LLC Agreement would provide that the Board of Directors may suspend or terminate a Member's voting privileges or membership in BSTX if the Member is subject to Statutory Disqualification, violates a material provision of the LLC Agreement or any federal or state securities law, or such action is necessary or appropriate in the public interest or for the protection of investors.<sup>70</sup> Any Director appointed by the Member subject to sanction would be excluded from any vote to suspend or terminate such Member.<sup>71</sup> To reflect further that BSTX is not solely a commercial enterprise, the LLC Agreement would also provide that no person subject to a Statutory Disqualification shall serve as a Director or Officer of BSTX.<sup>72</sup>

The provisions discussed above, which are designed to help ensure the independence of the Exchange's regulatory function and facilitate the ability of the Exchange to carry out its regulatory responsibilities under, and operate in a manner consistent with, the Exchange

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<sup>69</sup> See id. Section 18.1; see also Amendment No. 2, supra note 11, at 62.

<sup>70</sup> See BSTX LLC Agreement, Section 5.8; see also Amendment No. 2, supra note 11, at 53.

<sup>71</sup> See BSTX LLC Agreement, Section 5.8.

<sup>72</sup> See id. Section 4.1(a), (b); Section 4.5; see also Amendment No. 2, supra note 11, at 24-25, 24 n.51.

Act, are appropriate and consistent with the requirements of the Exchange Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.<sup>73</sup>

B. Regulatory Jurisdiction Over BSTX, the LLC Members, and Controlling Persons

The terms of the proposed LLC Agreement clearly describe the Commission's and the Exchange's regulatory jurisdiction over BSTX and its Members. The LLC Agreement would provide that, to the extent related to the operation or administration of the Exchange or the BSTX Market, the books, records, premises, officers, directors, agents, and employees of BSTX and its Members shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Exchange Act.<sup>74</sup> The LLC Agreement would also provide that the books and records of BSTX and its Members shall be maintained in the United States and shall be subject at all times to inspection and copying by the Commission and the Exchange.<sup>75</sup> As discussed above, Controlling Persons would also be required to abide by the provisions of the LLC Agreement, including the books and records requirements of Section 11.1.<sup>76</sup>

Further, the LLC Agreement would provide that BSTX, its Members, and the officers, directors, agents, and employees of BSTX and its Members irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and the Exchange for purposes of any suit, action, or proceeding pursuant to U.S. federal securities laws and the rules and regulations thereunder arising out of, or relating to, activities of the Exchange and BSTX

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<sup>73</sup> 15 U.S.C. 78f(b)(1).

<sup>74</sup> See BSTX LLC Agreement, Section 11.1.

<sup>75</sup> See id.

<sup>76</sup> See supra note 58 and accompanying text.

(except that such jurisdictions shall also include Delaware state courts for any such matter relating to the organization or internal affairs of BSTX) and waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that they are not personally subject to the jurisdiction of the U.S. federal courts, the Commission, the Exchange, or Delaware state courts, as applicable; that the suit, action, or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter may not be enforced in or by such courts or agency.<sup>77</sup> Moreover, BSTX, the Exchange, and each Member would be required to take such action as is necessary to ensure that BSTX's, the Exchange's, and such Member's officers, directors, and employees consent in writing to the application to them of the provisions in the LLC Agreement regarding books and records, regulatory obligations, and regulatory jurisdiction to the extent related to the operation or administration of the Exchange or the BSTX Market.<sup>78</sup> As discussed above, Controlling Persons must also abide by the provisions of the LLC Agreement, including the jurisdictional requirements of Section 18.6(b), as well as the requirement of Section 18.6(c) to take such action as is necessary to ensure that its officers, directors, and employees consent in writing to the application to them of certain provisions in the LLC Agreement to the extent related to the operation or administration of the Exchange or the BSTX Market.<sup>79</sup>

These provisions are consistent with the Exchange Act because they are reasonably designed to facilitate the Commission's and the Exchange's regulatory jurisdiction over BSTX and the BSTX Market. These provisions help facilitate the Commission's inspections

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<sup>77</sup> See BSTX LLC Agreement, Section 18.6(b).

<sup>78</sup> See id. Section 18.6(c); see also OIP, supra note 8, 86 FR at 53379; Amendment No. 2, supra note 11, at 61.

<sup>79</sup> See supra note 58 and accompanying text.

of BSTX's books and records by deeming them to be the books and records of a national securities exchange. Further, these provisions specify that the Commission may exercise its authority under Section 19(h)(4) of the Exchange Act<sup>80</sup> with respect to the officers and directors of BSTX and its Members, because such officers and directors are deemed to be officers and directors of the Exchange. Finally, the LLC Agreement states that, to the extent that they are related to BSTX's business, the books and records of BSTX are subject to the Commission's examination authority under Section 17(b)(1) of the Exchange Act.<sup>81</sup>

Furthermore, even in the absence of these provisions, Section 20(a) of the Exchange Act<sup>82</sup> provides that any person with a controlling interest in BSTX would be jointly and severally liable with and to the same extent that BSTX is liable under any provision of the Exchange Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. Moreover, the Exchange is required to enforce compliance with these provisions, because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Exchange Act.<sup>83</sup> A failure on the part of the Exchange to enforce its rules could result in suspension or revocation of its registration, pursuant to Section 19(h)(1) of the Exchange Act.<sup>84</sup> Also, Section 20(e) of the

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<sup>80</sup> 15 U.S.C. 78s(h)(4) (authorizing the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) Willfully violated any provision of the Exchange Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange).

<sup>81</sup> 15 U.S.C. 78q(b)(1).

<sup>82</sup> 15 U.S.C. 78t(a).

<sup>83</sup> 15 U.S.C. 78c(a)(27).

<sup>84</sup> 15 U.S.C. 78s(h)(1).

Exchange Act<sup>85</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Exchange Act or rule thereunder. Further, Section 21C of the Exchange Act<sup>86</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation.

C. Voting and Ownership Limitations; Changes in Control of BSTX

The provisions in the LLC Agreement placing limits on the ownership of Economic Units and Voting Units as a result of certain ownership transactions and limits on ownership of Economic Units and Voting Units by BSTX Participants,<sup>87</sup> as well as other provisions in

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<sup>85</sup> 15 U.S.C. 78t(e).

<sup>86</sup> 15 U.S.C. 78u-3.

<sup>87</sup> These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. See, e.g., Securities Exchange Act Release Nos. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (File No. 10-237) (order granting the registration of MEMX LLC) (“MEMX Order”); 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10-222) (order granting the registration of Investors’ Exchange, LLC); 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10-234) (order granting registration of Long Term Stock Exchange, Inc.) (“LTSE Order”); 79543 (December 13, 2016), 81 FR 92901, 92903 (December 20, 2016) (File No. 10-227) (order granting registration of MIAX PEARL, LLC) (“MIAX Pearl Order”); 68341 (December 3, 2012), 77 FR 73065, 73067 (December 7, 2012) (File No. 10-207) (order granting the registration of Miami International Securities Exchange, LLC); 58375 (August 18, 2008), 73 FR 49498, 49501 (August 21, 2008) (File No. 10-182) (order granting the registration of BATS Exchange, Inc.); see also Securities Exchange Release Nos. 76998 (January 29, 2016), 81 FR 6066, 6069 (February 4, 2016) (File No. 10-221) (order granting exchange registration of ISE Mercury, LLC); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10-209) (order granting the exchange registration of Topaz Exchange, LLC (n.k.a. Nasdaq GEMX, LLC; f.k.a. ISE Gemini, LLC); 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (SR-CBOE-2008-88) (Cboe demutualization order); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03) (NSX demutualization order); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26) (CHX demutualization order); and 49098 (January 16, 2004), 69 FR

the LLC Agreement relating to changes in control of BSTX, are consistent with the Exchange Act. These limitations and provisions are designed to prevent any owner of BSTX from exercising undue control over the operation of the Exchange and to help ensure that the Exchange is able to carry out its regulatory obligations under the Exchange Act.

As described above, the BSTX Market would be operated by BSTX, and BSTX would be a facility of the Exchange.<sup>88</sup> Ownership and voting interests in BSTX would be held by 11 Members, and the Exchange would not itself hold a voting or ownership interest.<sup>89</sup> Under the LLC Agreement, no event that would result in a Person,<sup>90</sup> together with its Related Persons,<sup>91</sup> owning directly or indirectly, of record or beneficially, an aggregate Economic

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3974 (January 27, 2004) (SR-Phlx-2003-73) (Phlx demutualization order). The Exchange states that Section 7.4 of the proposed LLC Agreement is substantially similar to provisions in the BOX Holdings LLC Agreement, subject to changes related to differences in BSTX's structure, or provisions in the Exchange LLC Agreement. See Amendment No. 2, supra note 11, at 53.

<sup>88</sup> See supra note 34 and accompanying text.

<sup>89</sup> See supra notes 28-30 and accompanying text.

<sup>90</sup> "Person" would be defined as any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. See BSTX LLC Agreement, Section 1.1.

<sup>91</sup> "Related Person" would mean with respect to any Person: (A) Any Affiliate of such Person; (B) any other Person with which such first Person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Units; (C) in the case of a Person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b-7 under the Exchange Act) or director of such Person and, in the case of a Person that is a partnership or limited liability company, any general partner, managing member or manager of such Person, as applicable; (D) in the case of any BSTX Participant who is at the same time a broker-dealer, any Person that is associated with the BSTX Participant (as determined using the definition of "person associated with a member" as defined under Section 3(a)(21) of the Exchange Act); (E) in the case of a Person that is a natural person and a BSTX Participant, any broker or dealer that is also a BSTX Participant with which such Person is associated; (F) in the case of a Person that



Percentage Interest greater than 40% (“Economic Ownership Limit”) would be effective without both the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act.<sup>92</sup> Notwithstanding the foregoing, a BSTX Participant, together with its Related Persons, would not be permitted to own directly or indirectly, of record or beneficially, an aggregate Economic Percentage Interest greater than 20% (“BSTX Participant Economic Ownership Limit”).<sup>93</sup> With respect to Voting Units, no event that would result in a Person, together with its Related Persons, owning directly or indirectly, of record or beneficially, an aggregate Voting Percentage Interest greater than 20% (“Voting Ownership Limit”) would be effective without both the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act. No BSTX Participant,

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is a natural person, any relative or spouse of such Person, or any relative of such spouse who has the same home as such Person or who is a director or officer of the Exchange or any of its parents or subsidiaries; (G) in the case of a Person that is an executive officer (as defined under Rule 3b-7 under the Exchange Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (H) in the case of a Person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. See id. “Units” would mean Economic Units and/or Voting Units. See id. “Affiliate” would mean with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership. See id.

<sup>92</sup> See id. Section 7.4(f); see also Amendment No. 2, supra note 11, at 16-17.

<sup>93</sup> See BSTX LLC Agreement, Section 7.4(f).

however, would be permitted to exceed this Voting Ownership Limit.<sup>94</sup> Additionally, the LLC Agreement would prohibit any Person from entering into any agreement, plan, or other arrangement with any other Person that would enable such Person, either alone or together with its Related Persons, to vote, possess the right to vote, or cause the voting of Voting Units in excess of the Voting Ownership Limit.<sup>95</sup> In addition to the approval of the Exchange and an effective rule filed pursuant to Section 19 of the Exchange Act, any waiver of the 40% Economic Ownership Limit or 20% Voting Ownership Limit would require the Exchange to make certain determinations.<sup>96</sup> As discussed above, the Exchange proposed to establish

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<sup>94</sup> See id. Section 7.4(g). The Exchange states that owners of the Exchange that are also Exchange Facility Participants are similarly limited to a maximum of 20% economic ownership of the Exchange. See OIP, supra note 8, 86 FR at 53369, n.39 and accompanying text (citing to Exchange LLC Agreement, supra note 48, Section 7.3); Amendment No. 2, supra note 11, at 21 n.41 and accompanying text (citing to Exchange LLC Agreement, supra note 48, Section 7.3). The Exchange also represents that the existing ownership limits of 40% economic ownership for owners of the Exchange, and further limitation of 20% economic ownership for owners that are Exchange Facility Participants, and the general limitation of 20% voting power of the Exchange would remain unchanged, and that these existing ownership limits would help ensure the independence of the Exchange's regulatory oversight of BSTX and facilitate the ability of the Exchange to carry out its regulatory responsibilities and operate in a manner consistent with Section 6(b)(1) of the Exchange Act. See OIP, supra note 8, 86 FR at 53369. "Exchange Facility Participant" means a firm or organization (including a BSTX Participant) that is registered with the Exchange pursuant to the rules of the Exchange that constitute the "rules of an exchange" within the meaning of Section 3 of the Exchange Act for purposes of participating in trading on any Exchange Facility. See Exchange LLC Agreement, supra note 48, Section 1.1; Amendment No. 2, supra note 11, at 5 n.9. "Exchange Facility" means any facility of the Exchange as defined in Section 3 of the Exchange Act. See Exchange LLC Agreement, supra note 48, Section 1.1.

<sup>95</sup> See BSTX LLC Agreement, Section 7.4(g). A Member could also voluntarily impose a lower ownership or voting restriction on itself. See id. Sections 7.4(g), (f); see also Amendment No. 2, supra note 11, at 18-19.

<sup>96</sup> See BSTX LLC Agreement, Sections 7.4(g), (f). The required determinations would be that (A) such waiver will not impair the ability of the Exchange to carry out its functions and responsibilities under the Exchange Act and the rules and

BSTX as a facility of the Exchange to operate the BSTX Market, and to adopt the LLC Agreement as the source of governance and operating authority for BSTX.<sup>97</sup> Additionally, the Exchange proposed that, upon adoption of the LLC Agreement, no person would hold more than a 40% Economic Percentage Interest or a 20% Voting Percentage Interest in BSTX,<sup>98</sup> and per the terms of the LLC Agreement, no person would be permitted to exceed a 40% Economic Percentage Interest or 20% Voting Percentage Interest in contravention of the Economic Ownership Limit or Voting Ownership Limit without the required waiver and an effective proposed rule change, each as would be required by Section 7.4 of the LLC Agreement.<sup>99</sup> Accordingly, pursuant to the Exchange's proposal, BSTX cannot commence operations as a facility of the Exchange until the proposed LLC Agreement is adopted, and the Economic Percentage Interest and Voting Percentage Interest of each of the Members does not exceed 40% and 20%, respectively.

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regulations thereunder, (B) such waiver is otherwise in the best interests of the Exchange and the Members of BSTX, (C) such waiver will not impair the ability of the Commission to enforce the Exchange Act and (D) if applicable, the transferee in such transfer and its Related Persons are not subject to a Statutory Disqualification. See id. The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange or its facility to waive comparable ownership and voting limitations for non-members of the exchange. See, e.g., MEMX Order, supra note 87, 85 FR at 27454; CBSX Order, supra note 54, 72 FR at 10578.

<sup>97</sup> See supra notes 13-15 and accompanying text.

<sup>98</sup> See supra note 30 and accompanying text (discussing the specific Economic Percentage Interest and Voting Percentage Interest to be held by each Member upon adoption of the proposed BSTX LLC Agreement pursuant to the proposed rule change).

<sup>99</sup> See BSTX LLC Agreement, Sections 7.4(g), (f). BSTX Participants, however, would not be eligible for a waiver of the applicable 20% BSTX Participant Economic Ownership Limit or the Voting Ownership Limit. See id.

The LLC Agreement also contains a provision designed to ensure that no owner of BSTX will exceed the Voting Ownership Limit. Specifically, with certain exceptions,<sup>100</sup> each Member would hold the number of Voting Units equal to the number of Economic Units held by such Member.<sup>101</sup> However, if any Member holds an Economic Percentage Interest in excess of the applicable Voting Ownership Limit, then the excess Voting Units held by such Member would be automatically reduced and redistributed among the remaining Members pro rata according to each such Member's respective Economic Percentage Interest ("Voting Units Adjustment"), so that the Member does not exceed the applicable limit.<sup>102</sup>

The LLC Agreement also contains other provisions that are designed to further safeguard the ownership and voting limitations described above, or are otherwise related to direct and indirect changes in control. Specifically, the LLC Agreement would require a Member to provide BSTX with written notice 14 days prior, and BSTX to provide the Exchange and the Commission with written notice ten days prior, to the closing date of any ownership transaction that would result in the Member's Economic Percentage Interest or a Voting Percentage Interest in BSTX, either alone or together with its Related Persons,

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<sup>100</sup> See infra note 102 and accompanying text.

<sup>101</sup> See BSTX LLC Agreement, Section 7.4(g)(i). Upon any change in the ownership of Economic Units for any reason, the Voting Units held by the Members would be recalculated simultaneously so that each Member holds the number of Voting Units equal to the number of Economic Units, subject to any automatic reallocation of Voting Units required by the Voting Units Adjustment (see infra note 102). See BSTX LLC Agreement, Section 7.4(g)(ii).

<sup>102</sup> See BSTX LLC Agreement, Section 7.4(g)(i). In calculating the Voting Units Adjustment, any applicable Voting Ownership Limit with respect to each Member would be observed and no Member would be permitted to hold Voting Units in excess of such Member's applicable Voting Ownership Limit. See id.

meeting or crossing the 5%, 10%, or 15% thresholds.<sup>103</sup> In addition, any Person that, either alone or together with its Related Persons, owns, directly or indirectly, of record or beneficially, 5% or more of Voting Percentage Interest or Economic Percentage Interest would, immediately upon acquiring knowledge of its ownership, be required to give BSTX written notice of that ownership.<sup>104</sup> In addition to these notice requirements, the LLC Agreement would require that any transfer or other ownership transaction that results in the acquisition and holding by any Person, alone or together with its Related Persons, of an aggregate Voting Percentage Interest or Economic Percentage Interest level which meets or crosses the threshold level of 20% or any successive 5 percentage interest would be subject to the rule filing process of Section 19 of the Exchange Act.<sup>105</sup> Further, any ownership transaction that would be in contravention of these notification and filing provisions, or otherwise violate Article 7 of the LLC Agreement, would be void.<sup>106</sup>

Moreover, the LLC Agreement would provide that a Controlling Person, unless it does not directly or indirectly hold any interest in a Member, shall be required to execute an amendment to the BSTX LLC Agreement upon establishing a Controlling Interest in a Member that, alone or together with its Related Persons, holds an Economic Percentage

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<sup>103</sup> See id. Section 7.4(e); OIP, supra note 8, 86 FR at 53369. The Exchange states that the provisions in proposed Section 7.4(e) are the same as those contained in Section 7.4(e) of the BOX Holdings LLC Agreement. See OIP, supra note 8, 86 FR at 53369 n.34.

<sup>104</sup> See BSTX LLC Agreement, Section 7.4(e). The notice would be required to state: (i) such Person's full legal name; (ii) the number of Voting Units and Economic Units owned, directly or indirectly, of record or beneficially, by such Person together with such Person's Related Persons; and (iii) whether such Person has the power, directly or indirectly, to direct the management or policies of BSTX, whether through ownership of Voting Units, by contract or otherwise. See id.

<sup>105</sup> See id. Section 7.4(e).

<sup>106</sup> See id. Section 7.4(d).

Interest or Voting Percentage Interest in BSTX equal to or greater than 20%, and abide by the provisions of the BSTX LLC Agreement to the same extent as if they were a Member.<sup>107</sup>

The LLC Agreement would further provide that the rights and privileges, including all voting rights, of the Member in whom a Controlling Interest is held would be suspended until the amendment has become effective pursuant to Section 19 of the Exchange Act or the Controlling Person no longer holds, directly or indirectly, a Controlling Interest in the Member.<sup>108</sup> According to the Exchange, as Controlling Persons of BSTX, Overstock, Medici, Medici GP,<sup>109</sup> BOX Holdings,<sup>110</sup> MX US 2, MX US 1, Bourse de Montreal, and

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<sup>107</sup> See id.; OIP, supra note 8, 86 FR at 53368 (stating that this proposed provision is the same as a BOX Holdings provision). The Exchange states that Related Persons that are otherwise Controlling Persons are not required to become parties to the LLC Agreement if they are only under common control of an upstream owner but are not in the upstream ownership chain above a BSTX owner because they will not have the ability to exert any control over BSTX. See OIP, supra note 8, 86 FR at 53368; see also supra notes 59-61, 79, and accompanying text (setting forth some of the provisions in the BSTX LLC Agreement to which Controlling Persons required to become parties to the BSTX LLC Agreement would be subject). Also, any additional or substitute Member of BSTX would be required to execute a counterpart to the LLC Agreement to evidence its acceptance of the terms and provisions of the LLC Agreement. See BSTX LLC Agreement, Section 7.1(b); see also Amendment No. 2, supra note 11, at 48.

<sup>108</sup> See BSTX LLC Agreement, Section 7.4(h)(iii).

<sup>109</sup> The Exchange states that membership interests in Medici GP are held by the following, each of which holds less than 25% of Medici GP: Carine Clark, Susannah Duke, Steve Glover, Brad Hintze, Jeff Kearl, Trevor Lund, Matt Mosman, Erika Nash, Zain Rizavi, Laura Summerhays, The Blake G Modersitzki 2020 Irrevocable Trust (affiliated with Blake G. Modersitzki), The Capitola Trust (affiliated with Chad Packard), The GP Investment Trust (affiliated with Chris Cooper), and The Oaxaca Dynasty Trust (affiliated with Ben Lambert). See OIP, supra note 8, 86 FR at 53368; Amendment No. 2, supra note 11, at 12.

<sup>110</sup> In addition to the direct owners of BOX Holdings identified above (see supra note 28), the Exchange states that UBS Americas Inc., JPMC Strategic Investments I Corporation, Wolverine Holdings, L.P., and Aragon Solutions Ltd. (“Aragon”), each hold less than a 5% outstanding units of BOX Holdings. See Amendment No. 2, supra note 11, at 9. The Exchange states that the current equity ownership and voting power of the direct owners of BOX Holdings are reflected in

TMX would be required to become parties to the BSTX LLC Agreement prior to commencement of operations of BSTX as a facility of the Exchange, by executing an instrument of accession,<sup>111</sup> and abide by its provisions to the same extent and as if they were Members.<sup>112</sup> The LLC Agreement also provides that any amendment to the LLC Agreement

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Securities Exchange Act Release No. 93778. See id. at 9 n.26. In Securities Exchange Act Release No. 93778, the Commission approved a proposed rule change related to changes in ownership of the Exchange and BOX Holdings. See Securities Exchange Act Release No. 93778 (December 14, 2021), 86 FR 72021 (December 20, 2021) (SR-BOX-2021-19). The Exchange also states that Will Easley owns Aragon and is a Director of BOX Holdings. See Amendment No. 2, supra note 11, at 8 n.20.

<sup>111</sup> Specifically, Exhibit 5B of the proposal contains instruments of accession that will be executed by all Controlling Persons prior, and as a condition, to commencement of operations of BSTX as a facility of the Exchange. Following commencement of operations as a facility of the Exchange, any new Controlling Person will be required to execute an amendment in substantially the same form, and the Controlling Person will agree to become a party to the LLC Agreement and abide by all of its provisions, to the same extent and as if they were Members. See Amendment No. 2, supra note 11, at 51.

<sup>112</sup> See id. at 13-14. As discussed above, BOX Digital and tZERO will each hold a 40% Economic Percentage Interest in BSTX. See supra notes 28-30 and accompanying text (discussing upstream ownership of BSTX). The Exchange states that Overstock owns 43% of tZERO directly and 99% of Medici, which owns 44% of tZERO, and that as a result, Overstock owns, directly or indirectly, more than 80% of tZERO, which will own 40% of the Economic Units and 20% of the Voting Units of BSTX. The Exchange states that as such, Overstock, Medici, and Medici GP will be required to become parties to BSTX's LLC Agreement by executing an instrument of accession and abide by its provisions, to the same extent and as if they were Members, because they are Controlling Persons of BSTX. In addition to the direct owners of tZERO identified above, the Exchange states that each of the following own less than 3% of the outstanding shares of tZERO: Todd Tobacco, Newer Ventures LLC, Schalk Steyn, Raj Karkara, Alec Wilkins, Dohi Ang, Brian Capuano, Trent Larson, Eric Fish, Kristen Anne Bagley, Kirstie Dougherty, SpeedRoute Technologies Inc., Tommy McSherry, Rob Collucci, John Gilchrist, John Paul DeVito, Jimmy Ambrose, Jason Heckler, Max Melmed, Alex Vlastakis, Olalekan Abebefe, Samson Arubuola, Ryan Mitchell, Zachary Wilezol, Anthony Bove, Ralph Daiuto, Rob Christiansen, Amanda Gervase, Derek Tobacco, Steve Bailey, and Dinosaur Financial. The Exchange also states that BOX Holdings, MX US 2, MX US 1, Bourse de Montreal, and TMX will each be required to become parties to the LLC

caused by the addition of a Controlling Person is subject to the rule filing requirements of Section 19(b) of the Exchange Act.<sup>113</sup> Thus, the addition of any future Controlling Person as a party to the LLC Agreement would be subject to the rule filing requirements of Section 19(b) of the Exchange Act.<sup>114</sup>

A proposed rule change submitted in any of the circumstances noted above would afford the Commission an opportunity to evaluate whether a change to the LLC Agreement, or a change in the ownership of BSTX, would be consistent with the Exchange Act, including whether the Commission and the Exchange would retain sufficient regulatory jurisdiction over the proposed indirect controlling party. The LLC Agreement would apply to any

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Agreement by executing an instrument of accession and abide by its provisions to the same extent and as if they were Members because they are Controlling Persons of BSTX. The Exchange states that TMX owns 100% of Bourse de Montreal, which owns 100% of MX US 1, which owns 100% of MX US 2, which owns more than 40% of BOX Holdings, and that BOX Holdings owns 98% of BOX Digital, which will own 40% of the Economic Units and 20% of the Voting Units of BSTX. See Amendment No. 2, supra note 11, at 11-14. The Exchange represents that there are no other “Controlling Persons” that would be required to become parties to the LLC Agreement prior to the commencement of operations of BSTX. See id. at 14.

<sup>113</sup> See BSTX LLC Agreement, Section 7.4(h)(iii). The Exchange states that the amendment will be in substantially the form of the instruments of accession filed by the Exchange as Exhibit 5B to the proposal and subject to the rule filing process pursuant to Section 19 of the Exchange Act. See Amendment No. 2, supra note 11, at 51.

<sup>114</sup> The Exchange states that it will implement policies and procedures, including annual attestations by Members, to ensure potential direct and indirect owners of BSTX are required to provide any required notice to BSTX or to take other actions, such as executing an amendment to the LLC Agreement upon establishing a Controlling Interest, if applicable, and to monitor compliance with the proposed provisions related to changes in ownership and control. See Amendment No. 2, supra note 11, at 52.



ultimate parent of BSTX, no matter how many levels of ownership are involved, provided that a Controlling Interest meeting the required threshold exists at each such level.

Although BSTX is not independently responsible for regulation, its activities with respect to the operation of BSTX must be consistent with, and not interfere with, the self-regulatory obligations of the Exchange. The proposed requirements in the LLC Agreement applicable to direct and indirect changes in control of BSTX described above, including the Economic Ownership Limit and Voting Ownership Limit imposed on Economic and Voting Unit transactions, as well as the Economic Ownership Limit and BSTX Participant Voting Limit imposed on owners of BSTX who are also BSTX Participants, are appropriate to help ensure that the Exchange is able to effectively carry out its self-regulatory responsibilities, including with respect to BSTX, and are consistent with the requirements of the Exchange Act. These limitations are also designed to help prevent any owner of BSTX from exercising undue control over the operation of the Exchange and to help assure that the Exchange is able to effectively carry out its regulatory obligations under the Exchange Act. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in a facility of the exchange. As the Commission has stated in the past, a member's interest in an exchange or a facility thereof could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.<sup>115</sup> A member that is a controlling shareholder of an exchange or its facility could seek to exercise that controlling

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<sup>115</sup> See, e.g., MEMX Order, supra note 87, 85 FR at 27455; LTSE Order, supra note 87, 84 FR at 21845; MIAx PEARL Order, supra note 87, 81 FR at 92906; and Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014, 5018 (January 28, 2009) (SR-NYSE-2008-120) (order approving a proposed rule change relating to the Limited Liability Company Agreement of the New York Block Exchange, a facility of NYSE) ("NYBX Order").

influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions.<sup>116</sup> As such, these requirements are expected to minimize the potential that a person or entity can improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Exchange Act.

BSTX's proposed governance provisions are consistent with the Exchange Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.<sup>117</sup> In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

#### D. Fair Representation of BSTX Participants

The Exchange's governance provisions are designed to provide fair representation of members in the selection of directors and the administration of the Exchange and are consistent with the Exchange Act. The Exchange states that it previously proposed structural changes to the Exchange to accommodate regulation of BSTX, in addition to the Exchange's existing facility (i.e., BOX Options), which the Commission approved,<sup>118</sup> and that, pursuant to the proposed rule change the Commission is approving today, with the addition of BSTX

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<sup>116</sup> See, e.g., MEMX Order, supra note 87, 85 FR at 27455; ISE Stock Order, supra note 54, 71 FR at 53735.

<sup>117</sup> 15 U.S.C. 78f(b)(1).

<sup>118</sup> See OIP, supra note 8, 86 FR at 53366 n.13 and accompanying text (citing BOX-2020-04 Approval, supra note 34); see also Bylaws of BOX Exchange LLC ("Exchange Bylaws").

as a facility of the Exchange, BSTX Participants would have the same representation, rights, and responsibilities as the Exchange’s other Exchange Facility Participants.<sup>119</sup>

The Exchange currently operates one facility, BOX Options,<sup>120</sup> and there are provisions in the Exchange LLC Agreement and the Exchange Bylaws (together the “Exchange Governing Documents”) that provide for the fair representation of Exchange members in the selection of directors and the administration of the Exchange that the Commission has previously found to be consistent with the Exchange Act, and in particular Section 6(b)(3) of the Exchange Act,<sup>121</sup> which, among other things, requires that the rules of an exchange ensure fair representation of its members in the selection of its directors and administration of its affairs.<sup>122</sup> Previously, because the Exchange regulated only one facility, the provisions in the Exchange Governing Documents providing for the fair representation of Exchange members were specifically applicable to BOX Options and to BOX Options Participants.<sup>123</sup> The Exchange subsequently amended those provisions to accommodate the Exchange’s regulation of multiple facilities.<sup>124</sup> The Exchange states that, with the Multiple Facilities Filing, it introduced structural changes to the Exchange to accommodate regulation

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<sup>119</sup> See OIP, supra note 8, 86 FR at 53366; Amendment No. 2, supra note 11, at 14.

<sup>120</sup> See supra note 34.

<sup>121</sup> See, e.g., Securities Exchange Act Release No. 66871 (April 27, 2012), 86 FR 26323, 26325 (May 3, 2012) (“BOX Form 1 Approval”); BOX-2020-04 Approval, supra note 34, 85 FR at 32085-86.

<sup>122</sup> 15 U.S.C. 78(b)(3).

<sup>123</sup> See generally BOX Form 1 Approval, supra note 121, 77 FR at 26325; BOX-2020-04 Approval, supra note 34. A “BOX Options Participant” is an Exchange Facility Participant that is registered with the Exchange pursuant to the Exchange Rules for purposes of participating in trading on the BOX Options Market. See BOX Holdings LLC Agreement, Section 1.1; Amendment No. 2, supra note 11, at 10, n.29.

<sup>124</sup> See BOX-2020-04 Approval, supra note 34; see also supra note 118 and accompanying text.

of BSTX in addition to the Exchange’s existing facility.<sup>125</sup> For example and among other changes, with the Multiple Facilities Filing, the Exchange replaced certain references in the Exchange Governing Documents to BOX Options with the term “Exchange Facility,” and to BOX Options Participant with the term “Exchange Facility Participant.”<sup>126</sup> The Commission found the provisions in the Exchange Governing Documents consistent with the Exchange Act as they applied to the Exchange’s existing facility – BOX Options.<sup>127</sup> In particular, the Commission found the Exchange Governing Document provisions to be consistent with Sections 6(b)(1), (3), and (5) of the Exchange Act.<sup>128</sup>

The requirements in the Exchange Governing Documents as they would now also apply to the representation of BSTX as an “Exchange Facility,” and to BSTX Participants as “Exchange Facility Participants,” are consistent with the Exchange Act. For example, the requirement in the Exchange Bylaws that at least 20% of the directors of the Exchange shall be “Participant Directors,”<sup>129</sup> and that at least one Participant Director shall be selected from among the Exchange Facility Participants of each existing Exchange Facility,<sup>130</sup> and the

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<sup>125</sup> See OIP, supra note 8, 86 FR at 53366.

<sup>126</sup> See BOX-2020-04 Approval, supra note 34, 85 FR at 32085.

<sup>127</sup> See id. at 32086.

<sup>128</sup> See id. at 32085-86.

<sup>129</sup> “Participant Director” means an Exchange Director who (i) has no material business relationship with the Exchange or any Affiliate of the Exchange, or any Exchange Facility Participant or any Affiliate of any Exchange Facility Participant and (ii) is not associated with any broker or dealer as required pursuant to Section 6(b)(3) of the Exchange Act, as amended; provided, however, that an individual who otherwise qualifies as a Public Director shall not be disqualified from serving in such capacity solely because such individual is a Director of the Exchange and/or the Chairman or Vice Chairman of the Exchange. See Exchange Bylaws, Section 1.01(w).

<sup>130</sup> See id. Section 4.02.

means by which they will be chosen,<sup>131</sup> provide for the fair representation of BSTX

Participants in the selection of directors and the administration of the Exchange, consistent with the Exchange Act, and in particular with Section 6(b)(3) of the Exchange Act.<sup>132</sup> As the

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<sup>131</sup> See *id.* Section 4.06.

<sup>132</sup> 15 U.S.C. 78(b)(3). Among other things, these provisions provide that the Nominating Committee of the Exchange shall be composed of at least five members, and that at least twenty percent (20%) of the members of the Nominating Committee shall be Participant Representatives and at least one Participant Representative shall be selected from among the Exchange Facility Participants of each then existing Exchange Facility. See Exchange Bylaws, Section 4.06(a). “Participant Representative” means an officer, director or employee of an Exchange Facility Participant. See *id.* Section 1.01(v). The Exchange states that, under the Exchange Bylaws, as soon as practicable after the commencement of operations of BSTX as a new facility of the Exchange, a Participant Director, Participant Representative, Facility Director (defined further below), and Facility Representative (defined further below) will be appointed by the Exchange Board from among the eligible individuals with respect to the BSTX facility and that such individuals shall serve in their respective capacities until the first annual meeting of the Exchange members following appointment, when the regular selection processes shall govern. See OIP, *supra* note 8, 86 FR at 53380 (citing Exchange Bylaws, Section 4.02). As Exchange Facility Participants, and as is the case with respect to the Exchange’s existing facility, BOX Options, BSTX Participants will also be entitled to representation on certain other committees of the Exchange, such as the Exchange’s Hearing Committee. For example, the Exchange’s Hearing Committee or any panel thereof shall include at least one Participant Representative and shall have exclusive jurisdiction to conduct hearings on disciplinary proceedings brought by the Exchange against any Exchange Facility Participant, or any Person employed by or associated with any Exchange Facility Participant for any alleged violation of the Exchange Act, the rules and regulations thereunder, the Exchange Bylaws or Exchange Rules, or the interpretations and stated policies of the Exchange Board. See Exchange Bylaws, Section 6.08(a); see also OIP, *supra* note 8, 86 FR at 53380 (stating that the Exchange’s Hearing Committee includes Exchange Facility Participants, which could include one or more BSTX Participants). The Exchange’s Executive Committee, if appointed and with certain exceptions, may exercise all the powers and authority of the Exchange Board in the management of the business and affairs of the Exchange. Pursuant to the Exchange Bylaws, at least 20% of the members of the Executive Committee shall be Participant Directors and at least one Participant Director shall be selected from among the Exchange Facility Participants of each then existing Exchange Facility. See Exchange Bylaws, Section 6.04; see also Amendment No. 2, *supra* note 11, at 63-64.

Commission has previously stated, these requirements help to ensure that members of the Exchange have a voice in the use of self-regulatory authority, and that the exchange is administered in a way that is equitable to all those who trade on its markets or through its facilities.<sup>133</sup>

As discussed above, the Commission also found the Exchange's amendments to the Exchange Governing Documents to provide for direct representation of the Exchange's facility (BOX Options) on the Exchange Board and its Nominating Committee to be consistent with the Exchange Act.<sup>134</sup> The Exchange believes that the provisions in the Exchange Bylaws that a Facility Director<sup>135</sup> representing BSTX would serve on the Exchange Board<sup>136</sup> and that a Facility Representative<sup>137</sup> would serve on the Exchange Nominating Committee<sup>138</sup> provide additional protection for both BSTX and BSTX Participants, and help to ensure that BSTX and BSTX Participants have a voice in the use of self-regulatory authority and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.<sup>139</sup> The Commission previously stated, in the context of the Exchange's existing facility, that changes to these provisions provide

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<sup>133</sup> See BOX Form 1 Approval, supra note 121, 86 FR at 26325.

<sup>134</sup> See supra note 128.

<sup>135</sup> "Facility Director" means a Director who is a director or senior executive officer of an Exchange Facility. See Exchange Bylaws, Section 1.01(j).

<sup>136</sup> A number of directors equal to the number of Exchange Facilities shall be Facility Directors and one such Facility Director shall be selected by each Exchange Facility. See id. Section 4.02.

<sup>137</sup> "Facility Representative" means a member of the Nominating Committee who is a director or senior executive officer of an Exchange Facility. See id. Section 1.01(j).

<sup>138</sup> One member of the Nominating Committee with respect to each Exchange Facility shall be the Facility Representative selected by such Exchange Facility. See id. Section 4.06(a).

<sup>139</sup> See OIP, supra note 8, 86 FR at 53380.

mechanisms whereby a facility of the Exchange would have direct representation on the Exchange Board and are appropriate and consistent with the Exchange Act.<sup>140</sup> The Commission finds that these provisions would similarly provide a mechanism whereby BSTX as a facility of the Exchange, like BOX Options, would have representation on the Exchange Board and are appropriate and consistent with the Exchange Act.

#### IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);  
or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BOX-2021-14 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BOX-2021-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

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<sup>140</sup> See BOX-2020-04 Approval, *supra* note 34, 85 FR at 32086.

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BOX-2021-14, and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. The Commission notes that the original proposal and the proposal as modified by Amendment No. 1 were published for comment in the Federal Register.<sup>141</sup>

In Amendment No. 2, the Exchange amended the proposal to: (1) Introduce certain defined terms, including “Shortfall Amount,” “Statutory Disqualification,” and “Tax Matters Representative,” (2) convert existing class A and class B units of BSTX to Economic Units and Voting Units of BSTX, (3) remove the requirement that the BSTX Board will appoint an Audit Committee and a Compensation Committee,<sup>142</sup> (4) specify the individuals and entities

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<sup>141</sup> See Notice, supra note 3; OIP, supra note 8.

<sup>142</sup> The Commission notes that this configuration is similar to other rule filings the



that own economic and voting interests in BSTX and at what levels, including that BOX Digital and tZERO's economic interests have been reduced to 40% each and that BOX Digital and tZERO's voting interests have been reduced to 20% each, (5) revise Exhibit 5B to propose the form of Instrument of Accession that each identified Controlling Person would sign, and (6) make other technical, clarifying and conforming changes. These changes help to clarify the proposal by providing additional specificity regarding how and by whom ownership and voting interests in BSTX are held, the structure and operation of the BSTX Board, and which persons will be required to comply with the LLC Agreement.

In addition, the Exchange made several changes to bring the proposed rules into closer alignment with the rules establishing the governance structure of other national securities exchanges, including by: (1) Prohibiting events that would result in any Person, together with its Related Persons, holding an Economic Percentage Interest in BSTX greater than 40% or a Voting Percentage Interest in BSTX greater than 20% without both Exchange approval and an effective rule filed pursuant to Section 19 of the Exchange Act, (2) prohibiting BSTX Participants from holding either an Economic Percentage Interest or Voting Percentage Interest in BSTX greater than 20%, (3) providing that no person subject to a Statutory Disqualification will serve as a Director or Officer of BSTX, and (4) representing that the Exchange will have adequate funding for the Exchange's operations with respect to BSTX. These changes help make these aspects of the proposal substantially similar to the existing rules of national securities exchanges. In addition, the Exchange modified the structure and composition of the BSTX Board by limiting BOX Digital and tZERO to one Member Director each, providing the Regulatory Director with voting rights, adding the

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Commission has approved. See, e.g., NYBX Order, supra note 115; ISE Stock Order, supra note 54.

BSTX CEO as a Director, and providing that the Independent Director will serve as chairman of the BSTX Board. These changes enhance the ability of the Exchange to carry out its regulatory oversight of BSTX by limiting the ability of Members of BSTX to control the BSTX Board.

For these reasons, the changes and additional information in Amendment No. 2 assist the Commission in finding that the proposal is consistent with the Exchange Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>143</sup> to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>144</sup> that the proposed rule change (SR-BOX-2021-14), as modified by Amendment No. 2 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>145</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022-03873 Filed: 2/23/2022 8:45 am; Publication Date: 2/24/2022]

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<sup>143</sup> 15 U.S.C. 78f(b)(2).

<sup>144</sup> 15 U.S.C. 78s(b)(2).

<sup>145</sup> 17 CFR 200.30-3(a)(12).